## LIM LAY SOOI & ANOR.
v.
## MERAH RUBBER ESTATES (1931) LTD.

[Court of Appeal (Taylor, Spenser Wilkinson and Wilson, JJ.) November 19, 1951]

[F. M. — Civil Appeal No. 31 of 1951]

*Landlord and Tenant — Forfeiture clause in lease — Waiver by acceptance of Rent — Relief against forfeiture.*

The respondents leased to the appellants a rubber estate for a period of three years from the 1st March, 1949. The lease contained provision for forfeiture in certain events. By notice in writing dated 24th April, 1950 the respondents purported to determine the lease under the forfeiture clause, and it was held in the Court below that on the facts a forfeiture had been incurred by the lessees. After the notice terminating the lease under the forfeiture clause but before action brought the respondents accepted two cheques for $450 tendered to them in May and June 1950 as rent payable in advance for the months of May and June. The letters accepting the cheques and the formal receipts given by the appellants stated that acceptance was without prejudice to the appellants' right to determine the lease and that the money was accepted by way of damages for use and occupation but not as rent.

**Held** (per curiam), That the appellants had accepted rent with knowledge of the cause of forfeiture and had thereby waived the forfeiture.

**Held** (per Taylor, J.), That in the circumstances of the case the lessees had reasonable grounds for equitable relief against forfeiture. Appeal allowed.

*Cases referred to:—*

(1) *Croft v. Lumley* 10 E.R. 672, 1459.
(2) *Davenport v. The Queen* (1877-8) 3 App. Cas. 115, 131.
(3) *Matthews v. Smallwood* (1910) 1 Ch. 777.
(4) *Hartell v. Blackler* (1920) 2 K.B. 161.
(5) *Fuller's Theatre & Vaudeville Co. v. Rofe* (1923) A.C. 435.
(6) *Clarke v. Grant* (1950) 1 K.B. 104.
(7) *Evans v. Enever* (1920) 2 K.B. 315.
(8) *Pennant's Case* (1596) 3 Coke's Reports 64a; 76 E.R..

COURT OF APPEAL.

*F. G. Pooley* for the appellants.

*R. D. Hume* and *G. H. Conaghan* for the respondents.

*Cur. Adv. Vult.*

**Taylor, J.** : — This is an appeal by lessees against an order of the High Court at Alor Star terminating a lease of land in Kedah on the ground of breach by the lessees of some of the terms of the lease.

The lessors are a rubber company whose enterprise consists not of one or two large blocks of land, which is the more economic and usual arrangement, but of a number of separate properties; one of these, the Padang China division, contained old trees which had been tapped so coarsely in the past that the bark was very poor; during the enemy occupation the area became overgrown, and it has not since been put into proper order; in March 1949 the price of rubber was relatively low, working conditions were difficult owing to the emergency, an appreciable portion had been severely damaged by fire and, from the point of view of the company, it was a grave question whether operating this division was an economic proposition; in these circumstances they decided to lease it for three years to the appellants on the terms, *inter alia*, that rent should be payable monthly in advance, that the estate should be maintained in its then condition, that the method and quality of tapping should be maintained, that bark consumption should not exceed one inch monthly and that the Company's manager should be the sole judge of these technical standards. The "then condition" was in fact so bad that immediately after execution of the lease, and without any obligation to do so under its provisions, the company paid $600 to the lessees, in cash, towards the costs of slashing the undergrowth.

In February 1950 a London director of the Company visited Malaya; the price of rubber had risen and it was decided to sell the Padang China division for $200 an acre, if that price could be obtained. It does not appear that the rights of the lessess were considered in any way at that stage. In March the manager was relieved by Mr. Augustin who was instructed to report on the condition of the division and did so — very adversely to the lessees. It is not without significance that the previous manager, who was much better acquainted with the condition of the division during the material period, was not called though he was available in Malaya at the date of the trial.

On 12th April the Company granted an option to a prospective purchaser; they said nothing to him about the lease; they say, now, that they had already decided to forfeit the lease, on the strength of a brief oral report by Augustin but they did not give notice to the lessees, purporting to forfeit, until the 24th. At about the same time they sent to the option holder a draft agreement of sale subject to the lease. It is clear that they had committed themselves to the option holder before they gave any notice to the lessees and before they knew in any detail what grounds of forfeiture there might be and certainly before they had any advice as to whether those grounds were adequate. There is a reasonable inference that Augustin well knew when he made his written report of 21st April

that his employers had a strong interest in terminating the lease and therefore wanted a report adverse to the lessees. I accept that neither the Company's agents nor Augustin would receive any direct commission on the sale but the agents had committed the Company and themselves, Augustin was their servant and both were strongly biassed.

Several experienced planters gave evidence of the condition of the estate, having inspected it for the purpose of the litigation. These gentlemen were put forward as independent witnesses but it was admitted from the bar at the hearing of the appeal that at least one of them, Fraser, was employed by another Company controlled by the same firm of agents and therefore far from independent.

All the evidence for the Company should have been scrutinised from the point of view that their policy had changed — that they wanted to get rid of the lessees and were biassed. The learned trial Judge said, at page 81 :—

"If, however, the tapping, the bark consumption and the condition of the Division were such as Mr. Augustin had described to Mr. Reid on the 6th and 11th of April and Mr. Augustin was of the opinion as he stated he was, that the lease should be terminated, the Company's agents would have been failing in their duty if they had refused to accept an offer which came within the Company's predetermined policy of sale."

In this paragraph there is not a word about the possible interests of the lessees; the learned Judge was thinking only of the duty of the directors towards their shareholders which was not in question in the action. This was a misdirection in point of law and it is not improbable that it coloured his mind in weighing the evidence. At page 85 he said : — "I do not consider that the lessees are entitled to any equitable relief whatsoever."

In point of fact the division never was, at any material time, in a state approaching the standard of cultivation and maintenance customary on European-managed estates. It was in bad condition at the commencement of the lease and there is no evidence that it became any worse. The stipulation against wounding must be interpreted realistically. Even on the best estates, with expert tappers and careful supervision, a certain amount of wounding always does occur; it is humanly impossible to avoid it absolutely. Where, as here, the trees have been badly wounded in the past and the new bark has grown over the wounds, the renewed bark is uneven, almost as though half walnut shells had been stuck on to the wood underneath it, and it is a physical impossibility to tap again without further wounding.

There was no clear reason for forfeiture except the over-consumption of bark, which admittedly exceeded the one inch monthly allowed in the lease, but this might have been remedied, at least in part, during the remainder of the term. In my opinion the lessees had reasonable grounds for equitable relief against forfeiture and these ought to have been seriously considered, especially as the lessees offered to employ the Company's manager and to submit to any other terms which the Court might impose. It is, however, unnecessary to discuss this aspect of the case in detail because the Company waived the cause of forfeiture by accepting rent with full knowledge of the breach of the lease. It is clear from the authorities cited that a lessor cannot lawfully say : — "I will keep the money which you tender as rent because I think that I shall probably become entitled to it on other grounds." Waiver of notice, where a tenancy is terminable by notice without any breach, is a different thing from waiver of a breach which merely gives the landlord an option to determine the tenancy. It is not necessary to review the arguments on this issue which have been examined by the other members of the Court; it is enough to say that I agree with their conclusion. The appeal should therefore be allowed with costs, here and below.

**Spenser Wilkinson, J.** : — The controversy in this case arose out of a lease of a part of the Merah Rubber Estate by the respondents to the appellants for a period of three years from the 1st March, 1949. There was a clause in the lease whereby it should be forfeited if in the opinion of the manager the terms of the agreement were not being carried out by the lessees. By a notice in writing dated 24th April, 1950 the respondents purported to determine the lease under the forfeiture clause and as the appellants contested the respondents' rights to enforce this clause these proceedings were commenced in June, 1950 claiming possession and consequential relief.

The learned Judge at the hearing found as a fact that the appellants had not carried out the terms of the agreement in that they had inflicted damage on the rubber trees, had consumed more than the agreed amount of bark consumption, viz. one inch per month and had allowed the condition of the estate to deteriorate generally, and he gave judgment in favour of the respondents with costs.

The main grounds of appeal were that the forfeiture had been waived by acceptance of rent; that the breach of the agreement, if any, had been waived by acceptance, over a period of months, of the appellants' system of tapping; and that in any event the trial judge should have given the appellants relief against forfeiture on equitable grounds.

I do not find it necessary to consider any of the arguments put forward on the question of waiver by acceptance of the appellants' methods or on the question of relief against forfeiture, as in my opinion this appeal can be decided on the question of waiver by acceptance of rent. The passage of the learned Judge's judgment dealing with this point is quite short and I therefore set it out here in full :—

"It was also argued that any question of forfeiture was waived by the acceptance of rent. In fact no rent was accepted as such after the notice of April 24th save certain sums which were stated to be accepted without prejudice in lieu of damages, as appears from the correspondence in Exhibit 'A'. I hold on the evidence that there was no waiver by the Company."

The authorities on the question of waiver by acceptance of rent after grounds of forfeiture had arisen do not appear to have been fully cited to the learned Judge in the Court below and it may well be that if this had been done he would have decided differently.

The facts upon which the question of waiver rests are not in dispute. Under the lease rent was payable monthly in advance, on the 1st of each month. It is not disputed that the rent for the month of April, 1950 was paid within the first few days of April, but the respondents purported to determine the agreement by a letter dated 24th April, 1950. There is no offer in this letter to return any part of the rent for April, 1950. On the 2nd May, 1950 the appellants' solicitors wrote to the respondents' solicitors enclosing a cheque for $450 being rent for the month of May, 1950. The respondents' solicitors replied by a letter dated 4th May, 1950 in the following terms :—

"We have your letter of the 3rd instant herein enclosing your clients' cheque for $450 being the rent for the month of May, 1950.

Without prejudice to the Notice to your clients that the Lease is terminated, and without prejudice to the Writ of Summons which we are instructed to issue for recovery of possession of the premises, we accept this cheque by way of damages for use and occupation of the said lands; but not by way of being a payment on account towards damages caused by your clients to the Rubber Estates."

On the 9th May, 1950 respondents' solicitors wrote to the appellants' solicitors enclosing their clients' receipt for this sum of $450 and the receipt enclosed therewith dated 9th May, 1950 reads as follows :—

"We acknowledge receipt of cheque from Lim Lay Sooi and Khor Ah Por for the sum of $450 being rent for the month of May, 1950.

Without prejudice to the Notice that the Lease is terminated, and without prejudice to the Writ of Summons for recovery of possession of the premises, we accept this cheque by way of damages for use and occupation of the said lands; but not by way of being a payment on account towards damages caused by Lim Lay Sooi and Khor Ah Por to the Rubber Estates."

Similar correspondence took place between the respective solicitors in the early part of June, 1950 with regard to the rent for June.

There can be no question in this case that at the times when these two sums of $450 were accepted by the respondents, in May and June, 1950, they were aware of the grounds of forfeiture. The only question is whether they in fact accepted this money as rent or otherwise or whether they can be heard to say that they accepted it otherwise than as rent.

The appellants contended that the acceptance of this money was in law a waiver of the grounds of forfeiture, notwithstanding that the receipt was accompanied by a protest that the money was not accepted as rent. They relied upon the decision in *Croft v. Lumley*[1], *Davenport v. The Queen*[2], *Matthews v. Smallwood*[3], *Hartell v. Blackler*[4] and *Fuller's Theatre and Vaudeville Co. v. Rofe*[5]

In *Matthews v. Smallwood*[3] Parker, J. in discussing the question of waiver says :—

"It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decides, and therefore it is not open to a lessor who has knowledge of the breach to say 'I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve.' That is a position which he is not entitled to take up. If, knowing of the breach he does distrain, or does receive the rent, then by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything."

I can find no authority in which that statement of the law has been questioned. It is true that the case of *Hartell v. Blackler*[4] was over-ruled by the Court of Appeal in *Clarke v. Grant*[6], but it was over-ruled because the principle above stated had been applied not to a case of forfeiture but to a case of an acceptance of rent after a notice to quit, and the opening paragraph of the judgment of the Lord Chief Justice indicates that the law laid down in *Matthews v. Smallwood*[3] remains good law in so far as forfeiture cases are concerned. The paragraph reads as follows :—

"The county court judge has fallen into the error of confusing an acceptance of rent after a notice to quit with an acceptance of rent after notice that a forfeiture has been incurred. It has always been held that, if a landlord seeks to recover possession of property on the ground of a breach of covenant which entitles him to claim a forfeiture, acceptance of rent thereafter waives the forfeiture, for the reason that the landlord, where liability to a forfeiture has arisen, has the option of saying whether he will treat the breach of covenant as incurring a forfeiture or whether he will not. The breach makes it void. It has always been held that if the landlord accepts rent after notice of forfeiture he thereby acknowledges that the lease is continuing."

Mr. Hume for the respondents relied on the case of *Evans v. Enever*[7] which decides that if an action is brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election to determine the lease and that no subsequent acts of the plaintiff can be relied on as qualifying that position.

I do not think that this case assists the respondents. The plaint in this suit was not issued until June, 1950 but the rent for the whole month of June had already been received by the respondents in the early part of June.

Mr. Hume pointed out that in the case of *Croft v. Lumley*[1] Lord Wensleydale in his judgment said that the question of waiver was a question of fact. It is to be observed, however, that Lord Wensleydale was merely guarding against the supposition that he might be thought to have agreed that there was a waiver in that case. Actually the point was not decided because in view of the decision on the other questions in that case it did not arise. Moreover, it seems clear to me that when Lord Wensleydale said that it seemed to be a matter of fact he was referring to the rather complicated circumstances in which the alleged waiver was supposed to have arisen in that case. The question there arose as to whether the result of correspondence and oral discussions was that the money was or was not accepted as rent. However this may be the actual decision in *Croft v. Lumley*[1] in the House of Lords did not decide the question of waiver; but the opinion given in that case by the majority of the judges has been followed in the later cases above referred to and it is these later cases which are the authorities on the subject. The strong opinion given by Williams, J. in *Croft v. Lumley*[1] was cited with approval by the Privy Council in *Davenport v. The Queen*[2] in 1877, and in *Fuller's Theatre and Vaudeville Co. v. Rofe*[5] the Judicial Committee again reiterated the same principles by approval of Parker J.'s judgment in *Matthews v. Smallwood*[3]. At page 443 the judgment states :—

"In Matthews v. Smallwood Parker, J. laid down in terms which have often since been approved of the law upon this question of waiver with his accustomed clearness and accuracy."

Another point taken by Mr. Hume arising out of *Croft v. Lumley*[1] was the remark by Lord Wensleydale in his judgment (at page 1487 of 10, E.R.) that "Mr. Barnes did not re-demand the money when Mr. Martelli declared he would take it only as compensation". I do not read that remark as meaning that where a cheque is sent to a firm of solicitors as rent and they accept it as something else it therefore becomes the duty of the other side to demand the return of the cheque. I think this remark of Lord Wensleydale is one simply arising upon the peculiar facts of that particular case. I would adopt the passage that I have already quoted from the judgment of Parker, J. in *Matthews v. Smallwood*[3]. In my opinion the respondents in this case received rent with full knowledge of the position and nothing they could say by way of protest in their letter acknowledging receipt or in their formal receipts could avail them anything.

There is a further point in this particular case which confirms me in the view that I have just expressed. It was argued that as the money would in any event be due to the respondents as damages for use and occupation they were entitled to accept it in satisfaction of that claim instead of in satisfaction of rent. I do not think, however, that this argument (even if it were sound) is available to the respondents in this case by reason of the fact that the rent was payable in advance. They were thus not entitled to keep the money even for the purpose for which they purported to keep it.

For these reasons I am of opinion that before the suit was brought the respondents had waived the grounds of forfeiture by acceptance of rent and were therefore not entitled to succeed in the action. I would therefore allow the appeal and enter judgment for the appellants with costs here and below.

**Wilson, J.** : — In this case the respondents leased to the appellants a part of the Merah Rubber Estate by an agreement in writing dated the 5th day of March, 1949. The agreement contained a forfeiture clause which was perhaps of a somewhat unusual nature, but that does not affect my opinion of what should be the decision in this appeal. The learned trial Judge found that the respondents were justified in terminating the lease under the forfeiture clause and made an order for possession in favour of the respondents. The appellants urged on this appeal, amongst other grounds, that the forfeiture had been waived by acceptance of rent. Having regard to the conclusions to which I have come, I find it unnecessary to discuss any of the other grounds of appeal.

Considerable reliance was placed by the appellants on the decision in the case of *Matthews v. Smallwood*[3]. In that case Parker, J. held that waiver of a right of re-entry can only occur where the lessor, with the knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognizing the continued existence of the lease. He also stated :—

"It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law deeides, and therefore it is not open to a lessor who has knowledge of the breach to say 'I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve'. That is a position which he is not entitled to take up".

I do not think that exposition of the law can be queried. But on that authority alone I had some

doubts as to whether or no the respondents in this case had accepted rent with knowledge of the breaches of the agreement which led to the claim for forfeiture.

Under the agreement the rent was payable monthly in advance. At what stage the respondents became aware of the breaches of the agreement is not too clear, but it is at any rate certain that they knew of these breaches when they sent to the appellants a notice in writing dated 24th April, 1950, which purported to terminate the lease under the forfeiture clause. Subsequent to that date the appellants on the 2nd of May, 1950, through their solicitor sent a cheque for $450 being rent for the month of May, 1950. The respondents by a letter dated the 4th of May, 1950, accepted the cheque but stated that they did so without prejudice to the notice to the appellants that the lease terminated and without prejudice to the Writ of Summons which they were issuing against the appellants for recovery and possession of the premises and stated that they accepted the cheque by way of damages for use and occupation of the lands. In other words they purported to retain the sum of $450 not as rent but for use and occupation. In June, 1950 the appellants again tendered a cheque for $450 as rent for the month of June, and the respondents purported to have accepted it on the same terms as they accepted the previous cheque.

The question therefore is whether having accepted these two sums of $450 each subsequent to their knowledge of the breach of the agreement upon which they rely they are entitled to say that they had not accepted rent. If they have accepted rent, I think it is quite clear on the authority of the case of *Matthews v. Smallwood*[3] that they had waived the forfeiture.

In the case of *Croft v. Lumley*[1] the question of waiver of forfeiture was discussed on Error brought to the House of Lords. Nine Judges were summoned to express their views on various points raised in that case. Ultimately it was found, by reason of the answer of the Judges to other questions, not necessary to give a decision on the question of waiver. However, in that case Baron Channell stated as follows :—

"The party paying the money had, in my judgment, a clear right to appropriate it. He distinctly paid the money as rent. He refused to pay it otherwise than as rent. Mr. Martelli refused in language to receive it as rent; but he did take it. What he did, not what he said, was in my humble opinion the all-important matter. He should have declined to take the money at all, if he meant to elect to proceed for a forfeiture."

The remaining Judges with the exception of Mr. Justice Crompton were of the opinion that there had been a waiver of forfeiture. The facts were that the lessee tendered money in payment of rent due and required that it should be accepted as rent; the lessor refused so to accept it, but said that he would accept it as compensation for use and occupation.

It is true that Lord Wensleydale seemed doubtful as to whether in that case there was a waiver and he stated :—

"It seems to be a matter of fact rather than a matter of law; I am not quite sure that I should have come to the conclusion that the money was received as rent, or that that was the effect that ought to be ultimately ascribed to the transaction."

However that may be, in the case of *Davenport v. The Queen*[2] the following passage appears in the judgment of the Privy Council delivered by Sir Montague E. Smith :—

A question of this kind received great consideration in the House of Lords in **Croft v. Lumley**. In that case the facts were much more favourable to the contention that there was no waiver than in the present. The tenant tendered and paid the rent due on the lease after the landlord had declared that he would not receive it as rent under an existing lease, but merely as compensation for the occupation of the land. The opinion of all the Judges, except Mr. Justice Crompton, was that the receipt of the money under these circumstances operated as a waiver. In the present case the rent, as already stated, was received as rent, with, at most, a protest that it was received conditionally, and without prejudice to the right to deal with the land as forfeited. Lord Wensleydale, who was disposed to agree with Mr. Justice Crompton in his conclusion of fact in the particular case, appeared to have no doubt that when money is in fact received as rent the waiver is complete. A very learned Judge, Mr. Justice Williams, gave his opinion in the following terms: 'It was established as early as **Pennant's Case**[8] that if a lessor, after notice of a forfeiture of the lease, accepts rent which accrues after, this is an act which amounts to an affirmance of the lease, and a dispensation of the forfeiture. In the present case the facts, I think, amounts to this: that the lessor accepted the rent, but accompanied the receipt with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of opinion the protest was altogether inoperative, as he had no right at all to take the money unless he took it as rent; he cannot, I think, be allowed to say that he wrongfully took it on some other account, and if he took it as rent, the legal consequence of such an act must follow, however much he may repudiate them".

I have come to the conclusion that the respondents must be held to have accepted rent with knowledge of the breaches of the agreement and I would allow this appeal with costs in this Court and in the Court below.

Mr. Hume for the respondents placed reliance on *Evans v. Enever*[7] and in particular to the following passage in the judgment of Lord Coleridge, J. :—

"But there is a series of cases which establish that if an action is brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election to determine the lease, and that no subsequent acts of the plaintiff can be relied as qualifying that position".

In this case, however, the two cheques for $450 each were accepted before the plaint was filed on the 24th June, 1950.

*Appeal allowed.*